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Charles E. Freegard v. First Western National Bank : Brief of Respondent

Utah Supreme Court

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19503

IN THE SUPREME COURT

OF THE STATE OF UTAH

CHARLES E. FREEGARD, Plaintiff-Appellant, vs. FIRST WESTERN NATIONAL BANK, a corporation, Defendant-Respondent.	:	Case Nos. 19503 19794

BRIEF OF RESPONDENT

CONSOLIDATED APPEALS FROM JUDGMENTS OF THE SEVENTH JUDICIAL DISTRICT COURT OF GRAND COUNTY THE HONORABLE BOYD BUNNELL, PRESIDING

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

These cases, consolidated on appeal, both involve claims by the Appellant that the Respondent, First Western National Bank, as an escrow agent wrongfully endorsed over fire insurance proceeds to the Appellant's vendee.

DISPOSITION IN LOWER COURT

In District Court Civil Number 4939, the District Court granted the Respondent's Motion for Judgment on the Pleadings, finding that the Complaint failed to state a cause of action against the Respondent because no duty was owed with regard to the insurance proceeds.

Appellant filed a second Complaint based solely on negligence (District Court Civil Number 5052), and the court dismissed the same; again finding that the Respondent owed no duty to the Appellant with respect to the insurance proceeds and that the first Complaint was res judicata of the second.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of both of the above-stated Orders of the District Court.

STATEMENT OF FACTS

Respondent approves and agrees with the statement of facts contained in the Appellant's Brief.

ARGUMENT

I.

THE RESPONDENT, FIRST WESTERN NATIONAL BANK, OWED NO DUTY TO THE APPELLANT WITH REGARD TO DISPOSITION OF THE INSURANCE PROCEEDS.

The essential issue in these consolidated appeals is the existence or lack of duty on part of the Respondent, First Western National Bank (hereinafter referred to as the "Bank") as escrow agent, to dispose of insurance proceeds in accordance with a real estate contract between Appellant and his vendee. The issue of the applicability of res judicata, although dealt with herein, is not wholly dispositive, as the first of the consolidated cases was not subjected to that doctrine. The Appellant contends that the Bank owed both a contractual and ex delicto duty to disburse the insurance proceeds to him, hold them at his disposal, or return them to the insurance company for reissuance to Appellant. The Respondent contends that the escrow contract executed by the parties sets forth the undertaking of the Bank and therefore the full measure of its duties and obligations to the Appellant. That contract expressly absolved the Bank from the duty of insuring that the funds at issue were disbursed in accordance with the real estate contract.

A. The Respondent Bank Owed No Duty or Obligation To The Appellant With Respect To The Insurance Proceeds.

As is apparent from the Memorandums of Points and Authorities submitted by both parties in each case presented to the trial court, it is undisputed that an escrow depository is the agent of both parties to a real estate contract. Ford v. Guarantee Abstract and Title Company, 553 P.2d 254 (Ks. 1976), National Bank of Washington v. Equity Investors, 506 P.2d 20 (Wa. 1973). The dispute arises as to the conclusion that may be drawn from this concept.

Because the relationship of an escrow depository is that of an agent to his principal, the general rules of agency law control the determination of the scope of the duties and obligations owed to that principal. The prevailing, in fact overwhelming, view is that the scope of the agency relationship and therefore the matters about which fiduciary obligations are owed is determined by the agreement between the parties. State Auto Insurance and Casualty Underwriters v. Salisbury, 494 P.2d 529 (Ut. 1972), Williams v. Pilgrim Turkey Packers, 503 P.2d 710 (Or. 1972), Suitts v. First Security Bank of Idaho, N.A. 602 P.2d 53 (Id. 1979), Lloyd v. Southwest Underwriters, 169 P.2d 238 (NM 1946).

The escrow agreement extant between Appellant and First Western National Bank (R,20-22) unequivocally limited the

scope of the agency to receipt and disbursement of the installments due on the real estate contract and, upon full and final payment, a transfer of the documents necessary to vest legal title in the vendee. It specifically relieved the Bank from the obligation of enforcing any other provision of the real estate contract and therefore of controlling the disbursement of the insurance proceeds.

The Appellant advances the theory that the insurance proceeds should have been treated as an installment payment pursuant to the real estate contract. This theory, of course, requires a convoluted construction and interpretation of the escrow agreement which identifies the escrowed funds as those installment payments made pursuant to the real estate contract. While the Bank is not suggesting that a lump sum payment would not have been treated as funds subject to the escrow, it does believe that a check made payable to the vendee; not intended by the vendee to be payment on the contract, and not delivered to the Bank in its capacity as escrow agent, was outside the ambit of the escrow agreement. While it may have been intended by the Appellant and his vendee pursuant to their agreement that such proceeds were to be applied to the escrow, for the Bank to presumptively take such action would be contrary to the escrow agreement term absolving the Bank from enforcing that agreement.

The matter of insurance against fire and casualty loss and the disposition of any proceeds therefor were clearly beyond the purview of the escrow agreement.

The Appellant also argues that the Bank exceeded the authority conferred upon it by the escrow agreement and cites several cases which expound the proposition that such action subjects an escrow agent to liability. Again the Bank does not quarrel with that general rule of law. However, none of the cases cited by the Appellant nor any found by the Bank in which such an issue was decided, would impose liability here. In those cited by the Appellant, liability was found when the escrow agent took action with respect to the subject matter of the escrow but such action exceeded or was contrary to the express instruction of the escrow agent's principal. For example, in Tucson Title Insurance Company v. D'Ascoli, 383 P.2d 984 (Az. 1962), cited by the Appellant at page 10 of his Brief, the escrow instructions required the agent to conclude certain steps as conditions precedent to the purchase of a mortgage. If those steps were not completed within fifteen days, the mortgage was not to be purchased and the agent was to await further instructions. Contrary to those express instructions, the escrow agent purchased the mortgage without concluding the required conditions precedent. The case now before the court is clearly distinguishable from Tucson Title and

similar cases, for the subject matter of fire and casualty loss insurance was not a part of the escrow agreement and no instructions were given relative thereto.

A case most similar to the instant case is Cocke v. Transamerica Title Company, 464 P.2d 456 (Az. 1972). In Cocke, the seller of real property took a cash advance from the funds held in escrow as a result of delays in closing the sales transaction. The buyer agreed to this advance but to protect his interest in the event the escrow did not close, demanded and received a promissory note representing the amount of funds advanced to the seller. The seller eventually refused to close and the escrow agent in turn refused to release any documents or funds to either party. However, the $40,000.00 promissory note was never held in escrow and, of course, the buyer expected payment thereon. The seller brought suit against the escrow agent claiming, inter alia, that its failure to hold in escrow the $40,000.00 note and mortgage executed by the seller was a breach of the agent's fiduciary obligations and amounted to negligence. Reviewing this claim, the court found the escrow instructions silent as to the note and mortgage and therefore found that the transaction was de hors the escrow and therefore the agent had no duties or obligations with respect thereto.

B. The Bank Owed No Duties Apart From Those Set Forth In The Escrow Agreement and Arising By Implication Therefrom.

The Appellant's second point on appeal is that the Bank owed a duty of due care as a matter of law, apart from the escrow agreement, which duty included exercising control over the insurance proceeds. The Respondent stands by the proposition that while a duty of due care existed, it was owed only with respect to the subject matter of the escrow. See: Sell On Agency, page 115, E. S. Harper Company v. General Insurance Company of America, 430 P.2d 658 (Id. 1967).

The Appellant, in citing Biadi v. Lawyers' Title Insurance Company, 374 So.2d 30 (Fla. App. 1979) and DCR Incorporated v. Peak Alarm Company, 663 P.2d 433 (Ut. 1983), argues that in any contractual relationship there exists a duty of due care apart from the express mutual obligations contained in the agreement. This is stated most succinctly and appropriately for this case in State Insurance and Casualty, supra. In State Insurance and Casualty, the court held that an agent owes his principal the implied in law duties of reasonable care, diligence, competence, and good faith in addition to those obligations expressly stated in the contract. However, the court did not find that these enumerated duties extend beyond the stated subject matter of the agency. In the DCR Incorporated case cited

by the Appellant, the court held, quoting from the Restatement (Second) of Torts:

> One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of the others person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking. (Emphasis added.)

and from Vol. 1981, Number 1, B.Y.U. L. Rev. 33, 36:

> The duty concept limits defendant's liability to a claim arising out of particular relationships and risks. In professional negligence cases, a contract with the client most often creates a relationship in which the duty of care arises. However, the defendant's total liability is not based upon breach of contract but rather upon violation of the legal duty independently imposed as a result of what the defendant undertook to do with relation to the plaintiff's interest. (Emphasis added.)

Thus the duty of due care that exists vis-a-vis an established contractual relationship is bounded at its outer limits by the scope of the relationship measured by the agreement of the parties.

The Appellant would also have this court find that a duty existed as a result of the application of the "Rescue Doctrine". In support of this theory, the Appellant states that because the Bank endorsed the check for the insurance proceeds, it undertook the duty to insure proper disbursement. This argument is specious. It is precisely because of the Bank's

endorsement that the Appellant feels a duty was breached. It is because the Bank did not undertake the duty that the Appellant filed this lawsuit. The Appellant cannot create a duty to act from the mere failure to act.

II.

THE DOCTRINE OF RES JUDICATA BARRED ALL PROCEEDINGS UNDER THE APPELLANT'S SECOND COMPLAINT.

The Respondent contends that both Complaints filed by the Appellant (case numbers 19503 and 19794) allege the same cause of action and therefore the second Complaint was barred by the doctrine of res judicata. The Appellant argues that because the court in its Order dismissing the first Complaint did not specifically mention the issue of negligence; and thus the issue was not actually raised and decided, it is not res judicata of the second Complaint. The Bank submits that, in fact, the issue was raised and litigated; however, even if it were not, the bar still applies. Apart from the identity of causes of action requirement, no other requisites for the application of the doctrine are in dispute.

The doctrine of res judicata is applicable to bar a second lawsuit wherein a first lawsuit containing the same cause of action has reached final determination. The courts have posited

numerous criteria for use in determining if causes of action have a common identity; the most common being whether both are founded on the same transaction or occurrence; i.e., whether by one wrong a single right has been infringed, and whether this may be established by the same facts and circumstances in both actions. See: Tomiyasu v. Golden, 400 P.2d 414 (Nv. 1965), Wilson v. Bramblett, 371 P.2d 1014 (Az. 1962), Wells v. Ross, 465 P.2d 966 (Ks. 1970), Waxwing Cedar Products, Ltd. v. Koenckey, 564 P.2d 1061 (Or. 1977), Houser v. Southern Idaho Pipe and Steel, Inc., 646 P.2d 1197 (Id. 1982). In both Complaints filed by the Appellant, the same transaction forms the basis of the claim. That transaction is the Bank's endorsement of the insurance proceeds check. The first Complaint, as admitted by the Appellant, alleged negligence, as did the second; and the facts and circumstances necessary to establish either claim would be identical. Since the first Complaint alleged negligence on the part of the Bank, it is not dispositive, nor even relevant, that the trial courts dismissal order did not specifically state that the Appellant had no cause of action based on negligence. Stating that no cause of action existed as pled, when the Complaint alleged negligence, is sufficient. The judge's order was a final judgment on the merits and barred a second lawsuit. Cf: McBride v. State of Colorado Department of Revenue, Motor Vehicle Division, 626 P.2d 760 (Co. 1981), Whitecraft v. Simenza, 399 P.2d 757 (Mt. 1965), Torres v.

Kennecott Copper Corporation, 488 P.2d 477 (Az. 1971).

In his brief, the Appellant quotes Wheadon v. Pearson, 376 P.2d 946 (Ut. 1962), for the proposition that an issue must be raised and decided to be res judicata. However, this is only true if there is first a determination that the causes of action are not identical. The quoted language begins with that caveat. Furthermore, that an issue is not raised and litigated does not mean that the causes of action are not the same. Res judicata not only bars issues actually raised and litigated, but so long as the causes of action are the same, bars those that might have been raised and litigated as well. Richards v. Hodson, 485 P.2d 1044 (Ut. 1971), Bellaston v. Texaco, Inc., 521 P.2d 379 (Ut. 1974).

CONCLUSION

In consideration of the foregoing, the Respondent respectfully requests that the trial courts' Orders in cases number 19503 and 19794 be affirmed.

DATED this 1st day of June, 1984.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copy of the foregoing RESPONDENT'S BRIEF, postage prepaid, this 4th day of June, A.D. 1984, addressed as follows:

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